United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-1307

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To be argued by
W. CULLEN MACDONALD

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-1307

UNITED STATES OF AMERICA,

Appellee,

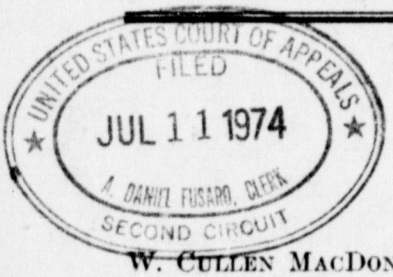
—v.—

JOSE RODRIGUEZ BAEZA,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA



PAUL J. CURRAN,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

W. CULLEN MACDONALD,
JOHN C. SABETTA,
S. ANDREW SCHAFFER,
Assistant United States Attorneys,
Of Counsel.

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Preliminary Statement

Jose Rodriguez Baeza appeals from a judgment of conviction entered on March 4, 1974, in the United States District Court for the Southern District of New York following a one month trial before the Honorable Thomas P. Grisea, United States District Judge, and a jury.

Indictment S 73 Cr. 994, in three counts, was filed on October 29, 1973, superseding Indictment 73 Cr. 713 and 73 Cr. 978. Count One charged Baeza and seven co-defendants with conspiring to import and distribute narcotics in violation of, prior to May 1, 1971, Title 21, United States Code, Section 173 and 174, Title 26, United States Code, Sections 4701, 4703, 4704, 4771 and 7237 and Title 18, United States Code, Section 1403, and, on and after May 1, 1971, Title 21, United States Code, Sections 812, 828, 841, 843, 951-952, 955, 959-960. Count Two charged Baeza and his seven co-defendants with possessing with the intent to distribute

approximately 516 grams of heroin hydrochloride on September 19, 1971, in violation of Title 21, United States Code, Sections 812, 814(a)(1)(A) and 841(b)(1)(A). Count Three charged an eighth co-defendant with the unlawful promotion, supervision, and management of a continuing narcotics criminal enterprise in violation of Title 21, United States Code, Section 848.

Trial commenced on November 13, 1973, against Baeza and four co-defendants.* On December 14, 1971, as to Baeza, the jury returned a verdict of guilty on Count One, the only count submitted against him.** On that same day, the jury acquitted two of Baeza's co-defendants; and four days later, on December 18, 1973, jury disagreement resulted in the declaration of a mistrial as to the remaining two co-defendants.

On March 4, 1974, Judge Grisea sentenced Baeza to a seven year term of imprisonment, which he is currently serving.

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* Three co-defendants (Vidal, Orsini and Doe) were fugitives at the time of trial and the fourth, Ortega, had secured a severance.

** The District Court dismissed Count Two against Baeza at the close of the Government's case. It refused the Government's request to put to the jury the question of Baeza's guilt on that substantive count on the theory set out in *Pinkerton* v. *United States*, 328 U.S. 640 (1946); it found, rather, that Baeza's participation in the conspiracy had been "terminated" before the date of the substantive offense, relying on evidence of a discussion among other co-conspirators as to the advisability of excluding Baeza from further dealings in response to a complaint of one of their several European heroin sources. The court reached that conclusion despite the absence of any affirmative evidence of Baeza's withdrawal from the conspiracy and in the face of proof of his participation with his co-conspirators in an importation of heroin from another source subsequent to his supposed withdrawal (See p. 6 *infra*).

Statement of Facts

The Government's Case

In the summer of 1968, co-defendant Luis Gomez Ortega introduced Baeza to George Warren Perez, a Government witness, at the latter's travel agency. Perez, who had previously sold airline tickets to Ortega with the knowledge that the latter traveled in furtherance of his business of importing heroin from Europe, was assured by Ortega that Baeza could be trusted. Ortega had known Baeza in Cuba for many years (Transcript of November 16, 1973, p. 22).

In September of that year, Baeza and Ortega returned to Perez's agency with Jose Jiminez Centaur, whom Ortega identified as "our contact in Spain" (*Id.* at p. 23), and purchased from Perez airline tickets to Spain. Two days later Baeza and Ortega returned with $100,000 in currency of low denominations which Perez, for a one per cent fee, converted into larger denominations (*Id.* at p. 23-26).

Approximately a month later the same three returned to Perez's agency. Ortega told Perez that they had made contact in Mexico and would soon be bringing heroin to New York through San Antonio, Texas. Shortly thereafter, Baeza and Ortega purchased airline tickets to San Antonio, Texas from Perez (*Id.* at pp. 25-26).

In early April 1969, Perez changed $200,000 in small denominations into bills of larger denominations for Baeza and Ortega. A few days later, Baeza and Ortega purchased from Perez two airline tickets to Geneva, Switzerland for one Esther Sierra and a Frenchman named Mindaa (GX 18; *Id.* at p. 27). Ten days thereafter, Baeza and Ortega reported to Perez that the $200,000 had been successfully exported to buy more heroin (*Id.* at p. 38).

On May 14, 1969, Baeza and Ortega, who was then traveling under the alias "Juan Plaza", flew to Geneva, Switzerland, via San Antonio, Texas and Chicago, Illinois, on tickets obtained from Perez (GX 19; *Id.* at pp. 40-42).

On July 16, 1969, Baeza and Ortega met with Perez at the travel agency, in the company of two unidentified French suppliers, and told Perez of the success of their previous trip during which they had secured another "new source of supply in Europe" (*Id.* at p. 43). On this occasion, Perez again changed $200,000 into bills of larger denominations and issued tickets to Geneva, Switzerland, via Newark, New Jersey and Detroit, Michigan, to Baeza, Ortega and the two Frenchmen, under false names for the latter three (GX 20; *Id.* at p. 4445 and 4748). They told Perez that the purpose of the trip was to deposit the cash in a Swiss account as a prelude to preparing for the next heroin shipment (*Id.* at p. 48).

On August 4, 1969, Baeza and Ortega purchased from Perez three first class tickets from Newark, New Jersey, to San Antonio, Texas, for themselves and Baeza's girl-friend, Gladys Taboada * (GX 21; *Id.* at pp. 49-50). On this occasion, the flight carrying Baeza and Ortega, who was ticketed as A. Torres, followed Taboada's by nearly two hours (GX 21). Baeza specified to Perez that the purpose of the trip was "to pick up some heroin there and bring it back to New York" (*Id.* at p. 50). At no time, either before he proposed this "vacation trip"

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* Taboada and Baeza had known one another in Cuba. She had first contacted him in New York in January 1969 by leaving a message for him at 587 Riverside Drive, New York, New York, an address at which the future activities of the conspiracy would be centered. That same month, Baeza lavished on Taboada $3,000 worth of new clothing which he said he had paid for out of the profits of his jewelry business (Transcript of November 27, 1973, pp. 17-19). He told her that it was that business which was the cause of his frequent trips abroad (*Ibid*).

(Transcript of November 27, 1973, p. 72), or at any point during their comings and goings to a private house in the country outside of San Antonio, Texas, did Baeza reveal the trip's true purpose to Taboada (*Id.* at pp. 71-75). As far as she knew, it was just a social visit during which the three of them were joined by Esther Sierra, the courier on the earlier trip that year, B. Rodriguez, a co-defendant from New York, and an unidentified visitor from Mexico (*Id.* at p. 74). The visits of the latter two were sequential and quite brief, i.e., two to three hours for one and "a few minutes" for the other (*Ibid.*). Afterwards, in New York, Baeza delivered a fourth briefcase full of money to Perez for changing.

> "A few days later Baeza and Ortega came to my office, Baeza carrying again a briefcase with about $200,000, and I charged, and he requested me to change for him and for Ortega the money for large bills, and Ortega say, 'Baeza will pick up the money in three or four days later.' And he [Baeza] did" (Transcript of November 16, 1973, at pp. 50-51).

On September 25, 1969, Baeza traveled alone to Geneva, Switzerland with $250,000 to, as he put it, "prepare for the new shipment" (GX 22; *Id.* at p. 52). He also told Perez that he would be carrying money to some unidentified relatives of Ortega in the Canary Islands during this trip (*Ibid.*). On his return in early October, Baeza told Perez about his trip and his dealings with one of their several, different sources. Baeza said:

> "'Everything is perfect. I have a contact, the Frenchmen there, he referred to the Frenchman—and we expecting—I have made the arrangement for another load'" (*Id.* at p. 56).

In mid-October, 1969, Ortega visited Perez; this time without Baeza. Ortega told Perez of his receipt of a letter

from one of the French heroin sources in which its author objected to any further dealings with Baeza on the stated belief that he:

> ". . . is a weakling, and if anything happened to any of us, he is referring to the Frenchman himself, he [Baeza] is liable to talk and they may have a lot of trouble, and I want to keep him completely out of the business.
>
> * * * * *
>
> Q. Do you recall anything further with respect to that meeting with Ortega? A. He said in the letter that he will try to get rid of Baeza. He will not do more business with him. He will separate him, he will pay him, and he doesn't want to do any more business with him.
>
> The Court: And who was saying this?
>
> The Witness: Mr. Ortega is saying that" (*Id.* at p. 58).

Nevertheless, approximately two weeks later, Ortega and Baeza introduced Perez to a Corsican heroin dealer named Antoine Muzy (*Id.* at p. 55). Baeza stated that Muzy was "our contact in Europe, the *new* contact in Europe, and we are expecting a new shipment" (*Id.* at p. 53; emphasis supplied). Until its arrival in "two, three months" via the proven Mexican smuggling route, Muzy would live with Baeza at an apartment on 82nd Street, North Bergen, New Jersey (*Id.* at pp. 55, 51). During this period, Baeza, Ortega and Muzy visited Perez "several times" in connection with the latter's visa extensions (*Id.* at p. 53, 55). Finally in early December, 1969, Ortega and not Baeza delivered $250,000 to Perez for exchanging, told him that the shipment had been received, and obtained two tickets to Barcelona, Spain, in the names of Antoine Muzy and Maurice Vandelli (GX 23; *Id.* at p. 59).

On or about August 25, 1970, Ortega and Muzy returned to Perez who, incident to a 70 kilo heroin shipment smuggled into this country via the Mexican route, converted $250,000 into bills of larger denominations and sold a return ticket to Barcelona for Muzy (GX 26; *Id.* at p. 97). On or about November 29, 1970, Ortega returned to Perez with two Corsicans, Jean and Roch Orsini, and again converted $200,000—this time incident to a narcotics shipment received from the Corsicans—and issued to them tickets in the false names Huguen and LaTour to Buenos Aires, Argentina (GX 28; *Id.* at pp. 106-108). On or about January 12, 1971, Ortega met with Perez in connection with another exchange of $250,000, incident to a 70 kilo shipment received from Maurice Vandelli, Claude Schoch, Denise Schoch and R. Capasso, to all of whom Perez thereafter issued tickets to Rome, Italy (GX 31; *Id.* at pp. 112-113). On July 15, 1971, Claude and Denise Schoch returned to New York in advance of a planned 100 kilo shipment of heroin to New York aboard the QE II, which was aborted at the last minute (Transcript of November 19, 1971, pp. 26-30). On September 18, 1971, Jean Orisini, still traveling under the Huguen passport (GX 11), returned with Ortega to Perez in connection with another 100 kilo shipment of heroin which had just been cleared through a custom's search of the QE II and which had been under surveillance by law enforcement personnel from the beginning of the voyage.*

Baeza did not appear during any of these last five visits; nor did Ortega or anyone else mention his name. Law enforcement surveillance of the last trip did not disclose his presence although one of the addresses (587 Riverside Drive) which he had previously used as a message drop was visited by Orsini in the latter's efforts to contact Ortega and Perez. (GX 9; *Id.* at p. 39; Baeza Brief, p. 9).

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* Ortega, Perez and Orsini were convicted of narcotics offenses, arising out of this seizure (*United States* v. *Ortega*, 471 F.2d 1350 (2d Cir. 1972).

The Defense Case

Baeza offered no evidence.

ARGUMENT

POINT I

Baeza's conviction on the conspiracy count was entirely proper. He was not entitled to a severance after the wholly unwarranted dismissal against him of the substantive count. The jury was carefully instructed as to the applicability of the evidence against the several defendants and its verdict reflected its separate consideration of each defendant's guilt.

Baeza argues that the District Court committed reversible error in refusing to accord him a severance and separate trial on the conspiracy charge contained in Count One. He asserts that the jury's determination of that issue must have improperly included, despite an explicit contrary instruction from the Court, consideration of the 100 kilos of heroin, which underlay the substantive charge in Count Two and which had been imported and seized after Baeza's participation allegedly had come to an end. This impropriety is said to have been inevitable because the 100 kilos of heroin were the only narcotics received in evidence and their mere bulk is claimed necessarily to have pervaded the entire trial of all five defendants. The fact that the jury nevertheless acquitted two of the defendants as to whom the 100 kilo shipment was concededly fully admissible is alleged to have been the product of confusion. The arguments are without merit.

In the first place, Baeza's entire argument is premised on his having withdrawn from the conspiracy prior to the

100 kilo importation on September 19, 1971. While the District Court so ruled (Tr. 2202), that ruling was erroneous. The testimony did not support the conclusion that Ortega had fired Baeza and intended to "do [no] more business with him" (Tr. 58), since, after he had said that, he and Baeza induced their "new" source, Antoine Muzy, to ship a quarter million dollar shipment through Mexico (Tr. 59). Thus Baeza was still clearly a member of the conspiracy; never having demonstrated his affirmative steps of withdrawal and Ortega's efforts to terminate him being insufficient as a matter of law (*See United States* v. *Gonzalez-Carta*, 419 F.2d 548, 551 (2d Cir. 1969); *United States* v. *McGuire*, 249 F. Supp. 43, 49 (S.D.N.Y. 1965), *aff'd*, 381 F.2d 306 (2d Cir. 1967); *United States* v. *Borelli*, 336 F.2d 376, 388-389 fn. 8 (2d Cir. 1964); *United States* v. *Salazar*, 485 F.2d 1272 (2d Cir. 1973); A.L.I. Model Penal Code (P.O.D.) §§ 2.06(6)(c)(i) and 5.03(6) and discussion thereof at Tent. Draft Nos. 1-3, pp. 37-38 and No. 10, pp. 153-155).

In the second place, even assuming that Baeza withdrew from the conspiracy, it is clear that the evidence of the 100 kilo importation was still fully admissible and probative as to the other defendants,* if not Baeza himself.** The jury was given careful, lengthy and detailed instructions concerning the evidence which it was not to consider

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* In *United States* v. *Falley*, 489 F.2d 33, 36 (2d Cir. 1974), relied on by Baeza, the narcotics were "wholly unrelated to the incidents which were the subject matter of the indictment."

** It is axiomatic that the best proof of the existence of a conspiracy is proof that its objectives have been successfully achieved. Here proof of the 100 kilo importation tended to establish and corroborate the existence of, and Baeza's participation in, a conspiracy which began as early as September 1968, and whose means included the creation of the very procedures and routes which were successfully employed in the importation of

[Footnote continued on following page]

against Baeza.* That these guidelines prevented the indiscriminate use of the narcotics evidence against all defendants cannot be doubted since the jury acquitted two

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the 100 kilos of heroin complained of. Accordingly, the seizure remained directly admissible as against Baeza and he can hardly complain that the jury was told otherwise. *Abbate* v. *United States*, 247 F.2d 410, 413 (5th Cir. 1957), *aff'd*, 359 U.S. 187 (1959); cf. *United States* v. *Marchisio*, 344 F.2d 653, 667 (2d Cir. 1965).

*The District Court charged the jury on this point as follows:

> "In this connection I wish to give you a specific instruction regarding the defendant Baeza. Generally in this case the questions about whether a defendant was a member of the conspiracy and, if so, for how long are questions to be resolved solely by you, the jury. The question of whether Baeza joined the conspiracy is for you to decide. The testimony of Perez is that Baeza participated in the conspiracy from the summer of 1968 to about October or November 1969. Whether Baeza in fact did this is a question for you to determine. But the point I wish to make now is this If you credit the testimony of Perez on this point, then this testimony also includes the evidence that in October or November 1969 Ortega decided to cease employing Baeza in the heroin transactions. Moreover, Baeza is not even referred to with respect to any transactions after November 1969.
>
> I am instructing you now that if you find Baeza to have been a member of the conspiracy—and I repeat that this is a question for you to decide—but if you do find Baeza to be a member of the conspiracy, you can do so only with respect to the period before November 1969. This would still mean that Baeza could be guilty under Count 1, but the import of what I am telling you is to make clear the limitations on the evidence which can be considered against Baeza.
>
> You cannot consider against Baeza any of the acts or transactions occurring after November 1969. For instance, you cannot consider against Baeza the Jaguar transaction involving the shipment of heroin arrivng in New York in September 1971. You cannot consider against Baeza any of the evidence about that transaction, including the heroin that was introduced into evidence regarding that transaction" (Tr. 2853-2854).

of Baeza's co-conspirators and could not reach agreement as to the remaining two. Thus the instructions were sufficient to guard against prejudice and it was, accordingly, not an abuse of discretion to deny the severance (*United States* v. *Agueci*, 310 F.2d 817, 838-839 (2d Cir. 1962)). This Court has repeatedly held that wide discrepancies in the event of the proof and duration of participation of any one co-conspirator, during the life of a chain type narcotics conspiracy, are not grounds for a severance where the charge individualized the proof (E.g. *United States* v. *Bynum*, 485 F.2d 490, 497-498 (2d Cir. 1973); cf. *United States* v. *Calabro*, 467 F.2d 973, 983 (2d Cir. 1972)). And even counsel's unwarranted intrusion into the jury's reasoning (E.g. *United States* v. *Dioguardi*, 492 F.2d 70, 79-81 (2d Cir. 1974); *Miller* v. *United States*, 403 F.2d 77, 81-84 (2d Cir. 1968); *United States* v. *Driscoll*, 276 F. Supp. 333 (S.D.N.Y. 1967) cannot displace the undeniable fact that the verdicts were not dictated by the heroin admitted into evidence.

Finally, it should be noted that there was substantial evidence of Baeza's direct participation in at least six large scale heroin importations involving sums aggregating $1,200,000 and suppliers from all over Europe (Spain — Centaur; Switzerland — Mindaa; Switzerland — two Frenchman; Barcelona—Muzy and Vandelli). This evidence clearly negated the possibility that Baeza's conviction was the product of an improper spillover effect of evidence received against other defendants.

POINT II

Baeza's $3,000 single cash gift was directly probative of his complicity. No error resulted from its receipt and, clearly, no abuse of discretion occurred.

Baeza argues that the District Court erred in admitting into evidence Taboada's testimony that on January 8, 1969, outside of a New Jersey bank, Baeza had given her $3,000 in cash for the purchase of clothing. It is claimed that such proof was insufficiently connected with Baeza's narcotics profits to be probative of such and, accordingly, he is entitled to a new trial excluding the evidence. The argument is without merit. The District Court did not abuse its "wide discretion" in the admission of such circumstantial proof of Baeza's complicity in the narcotics trade (*United States* v. *Ravich*, 421 F.2d 1196, 1203-1205 (2d Cir. 1970); *United States* v. *Falley*, 489 F.2d 33, 38-39 (2d Cir. 1973)).

The possession of that sum was closely related in time and place to the direct evidence of Baeza's trafficking in narcotics. While it can be asserted—as Baeza's counsel did in summation with some force—that "there is no basis" (Tr. 2479) for inferring either that the cash resulted from profitable heroin transactions or that it represented "the lubricant of the narcotics trade" (*United States* v. *Bynum*, 360 F. Supp. 400, 419 (S.D.N.Y. 1973)), that argument goes to the weight to be accorded to the evidence not its admissibility and the District Court did not abuse its discretion in admitting such evidence. *United States* v. *Falley, supra;* See also *United States* v. *Tirinkian*, 488 F.2d 873, 874 (2d Cir. 1973).

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

PAUL J. CURRAN,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

W. CULLEN MACDONALD,
JOHN C. SABETTA,
S. ANDREW SCHAFFER,
Assistant United States Attorneys, Of Counsel.

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